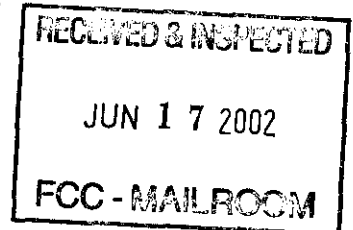


Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 02M-48
 01197

In the Matter of)	WT Docket No. 01-344
)	
KEVIN DAVID MITNICK)	File No. 00000-58498
)	
Licensee of Station N6NHG)	
in the Amateur Radio Service)	
for Renewal of Station License)	
)	
KEVIN DAVID MITNICK)	
)	
For Renewal of Amateur Radio)	
General Class Operator License)	



MEMORANDUM OPINION AND ORDER

Issued: June 7, 2002

Released: June 11, 2002

1. This is a ruling on Motion to Take Testimony by Speakerphone that was filed by Kevin David Mitnick ("Mitnick") on May 31, 2002. The Bureau filed its Comments on Motion to Take Testimony by Speakerphone on June 6, 2002.

2. Mr. Mitnick asks to take testimony of witnesses by speakerphone either at the hearing scheduled for June 18, 2002, or at a subsequent hearing session that would be scheduled for that purpose. Mr. Mitnick gives as reasons (1) the fact that the Presiding Judge had denied his motion of April 26, 2002, to reschedule the hearing to a date later than June 18;¹ (2) the fact that Mr. Mitnick has been devoting his time to writing a book and is now just turning to hearing preparation; and (3) the fact that the hearing involves a radio amateur license having no monetary value and that therefore Mr. Mitnick should not be expected to transport witnesses to Washington, D.C. in view of telephone testimony alternative.

3. Mr. Mitnick's direct case exhibits exchanged on June 4, 2002, include letters of commendation and rehabilitation. In anticipation of objection by the Bureau to such letters on grounds of hearsay, Mr. Mitnick asks to "take testimony of these and other witnesses to be notified by Mitnick by speakerphone."²

¹ See Order FCC 02M-34, released May 6, 2002. The date for exchanging exhibits was moved from May 14 to June 4 to accommodate Mr. Mitnick.

² Mr. Mitnick's hearing exhibits include letters from Mr. Hall, Mr. Hawley, Ms. Long, Mr. Press, Mr. Tucker and Mr. Arkow. But it is not made clear by identification who "other witnesses" might be. Counsel for Mr. Mitnick must advise Bureau counsel of the identity (name, address, phone number and purpose of testimony) of each of the "other witnesses" **by June 11, 2002**, or make clear that the speakerphone witnesses would be limited to the six letter writers.

Discussion

4. The relevant Commission rule provides:

Testimony by speakerphone: (a) If all parties to the proceeding consent and the presiding officer approves, the testimony of a witness may be taken by speakerphone.

(b) Documents used by the witness shall be made available to counsel by the party calling the witness in advance of the speakerphone testimony. The taking of testimony by speakerphone shall be subject to such other ground rules the parties may agree upon.

47 C.F.R. §1.364(a).

5. Speakerphone testimony is less desirable than live testimony because witness demeanor cannot be observed as questions are asked and answered. Also, there are possibilities for undetected misrepresentation if the witness testifies under a false name, or if the witness is coached through signals and/or notes that cannot be detected. See Note, Telephonic Testimony, Hastings Comm. and Ent. L.J., Fall 1999, 110, 117-18. And even though Mr. Mitnick ascribes a low economic value to the amateur radio service to which he seeks access, the standard of reliable proof remains the same for any APA administrative hearing. Mathews v. Eldridge, 424 U.S. 319 (1976).

6. The standard justification for speakerphone testimony is witness unavailability which is not the case here. It is concluded nonetheless that given the nature of the testimony and the ability to prescribe safeguards against misrepresentation, the special circumstances of this case support authorizing speakerphone testimony for cross-examination of non-party letter writers. See United States v. Sunrhodes, 831 F.2d 1537, 1543 (10th Cir. 1987) (witness had no personal stake and sufficient indicia of reliability were present to permit telephone testimony of available witness).

7. The Bureau has consented to the speakerphone testimony in this case, provided the parties agree to verification procedures. To meet the Bureau's concerns for verification and untainted testimony, which are shared by the Presiding Judge, the following cautionary procedures will be required. The speakerphone witness must testify in the presence of a notary public who will certify to the identity of the witness (i.e., establish that the witness is the person who he or she purports to be) and who will remain throughout the testimony to observe the witness testify.³ Alternatively, the speakerphone witness may testify at a Commission field office under the supervision of Commission staff.

³ One responsibility of the observing notary would be to assure that there are no notes or unauthorized writings used in connection with the testimony. Therefore, the witness must testify unaccompanied in a room or secured area before a notary, and the notary shall so certify for the record that the witness was not assisted in her/his testimony.

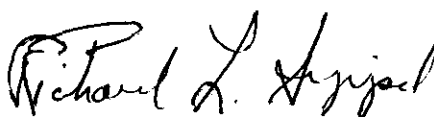
8. The speakerphone testimony procedures, as agreed to by the Bureau and Mr. Mitnick, shall be reduced to writing in the form of a Report on Speakerphone Testimony which shall be signed by Mr. Mitnick as well as his counsel, signed also by Bureau counsel, and submitted to the Presiding Judge by **4:00 p.m. on or before June 14, 2002**. Counsel must confer on the following for inclusion in the Report: (a) the identity of each speakerphone witness and the documentary exhibit(s) that relate to that witness and which might be used in the examination; (b) the date and time for receiving the testimony of each telephone witness;⁴ (c) acknowledgment that the witness will be sworn in by the Presiding Judge and will testify under oath; and (d) agree to insure that the witness shall have a current driver's license or passport to prove identity to the notary.⁵

9. Also, the cost of the telephone calls shall be born by Mr. Mitnick or the witness. Therefore, the speakerphone witness shall initiate the call to the courtroom speakerphone telephone number: **(202) 418-0166**. If the call is initiated from a phone in a Commission field office, the call may be charged to Mr. Mitnick's personal telephone, or to a personal telephone credit card. Mr. Mitnick also must agree to reimburse the Commission for the cost of any speakerphone call(s) initiated on a Commission telephone line should that become necessary as a last resort.

Ruling

Accordingly, IT IS ORDERED that there being no objection by the Enforcement Bureau, the Motion to Take Testimony by Speakerphone that was filed by Kevin David Mitnick on May 31, 2002, IS GRANTED, subject to agreement on the above specified conditions.

FEDERAL COMMUNICATIONS COMMISSION⁶



Richard L. Sippel
Chief Administrative Law Judge

⁴ The speakerphone testimony will be heard after the two live witnesses, Mr. Mitnick and Mr. Kasper. All testimony, including speakerphone testimony, should be completed by **June 19, 2002**.

⁵ A copy of the license or passport certified by the notary shall be filed as an exhibit, with appropriate exhibit numbers, by Mr. Mitnick's counsel by **July 23, 2002**.

⁶ Courtesy copies of this Order were sent to counsel for each of the parties by fax or e-mail on date of issuance.